



# Legal Specialization Digest

Issue 1 2006

<http://www.californiaspecialist.org>

## Getting Paid After BAPCPA: Why Being a Certified Bankruptcy Law Specialist Pays

By Hagop T. Bedoyan  
Certified Bankruptcy Law Specialist

On October 17, 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8 (2005), affectionately known as BAPCPA, took effect, dramatically changing the landscape for bankruptcy attorneys. Most experienced bankruptcy attorneys would generally agree that the changes brought about by BAPCPA did little to protect consumers, but instead made it more difficult for clients and attorneys assisting them in seeking relief under the United States Bankruptcy Code (11 U.S.C. § 101, et seq., "Code"). The enormity of

the changes, which are the most comprehensive since the enactment of the Code in 1978, are far too great to even summarize here and will be fodder for scholars, attorneys and the judiciary for years to come. However, for *Certified Bankruptcy Specialists*, there is a "bright spot" under BAPCPA with respect to getting paid for the services we provide in bankruptcy proceedings.

Bankruptcy attorneys, or BAPCPA's new pet name for us, *Debt Relief Agencies*, have always had to seek and obtain bankruptcy court approval to be employed by a bankruptcy estate (§327) and to be



Hagop T. Bedoyan

paid from the estate for services rendered during a bankruptcy proceeding

*Continued on Page 10*

## Tips for Filing A Petition for Writ of Mandate

By Joan Wolff  
Certified Appellate Law Specialist



Writ petitions are expensive, difficult to prepare, and rarely successful. Some trial court rulings, however, may *only* be challenged by a petition for writ of mandate (see, e.g., CCP 179.3(d) [motion to disqualify a judge]; Gov. Code §6259c [disclosure of public documents under the Public Records Act]; Bus. & Prof. Code §6259 [ruling on physician licensing matters]) and in other instances where the matter is so urgent it simply cannot await appellate review following trial.

Because the Court of Appeal's decision to review the issues presented in a writ petition is completely discretionary

(unless writ relief is the only appellate remedy), and because review may be

*Continued on Page 11*

## In This Issue

New Specialty Areas	2
Public Access & Private Parts	3
Technical Notes from Bovitz	5
Lex Lingua: Part I	7
Dual Specialists	8
Message from the Chair	16

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## New Specialty Areas Under Consideration

### Franchise and Distribution Law

**P**roposed Standards for Certification and Recertification in Franchise and Distribution Law are circulating for public comment. The full text of the Standards is available at [www.calbar.ca.gov](http://www.calbar.ca.gov) under the Public Comment link on the right-hand navigation bar. The deadline for public comment is June 15, 2006.

***In May 2005, the Franchise Law Committee of the State Bar of California's Business Law Section proposed that the Board of Legal Specialization (BLS) develop a Franchise Law specialty.***

In May 2005, the Franchise Law Committee of the State Bar of California's Business Law Section proposed that the Board of Legal Specialization (BLS) develop a Franchise Law specialty. A consulting group was created by the Board of Governors to determine the

feasibility of and develop standards for certification in that area. The group is comprised of 10 of the top practitioners in the state in the field of franchise and distribution law, including seven current or former co-chairs of the Franchise Law Committee, the chairman of the American Association of Franchisees and Dealers, and partners specializing in the discipline from the California offices of Morrison & Foerster, Sonnenschein Nath & Rosenthal, Jenkins & Gilchrist, and other prominent firms. The consulting group recommended to the BLS that it go forward with the proposed specialty, and that the area be expanded to include distribution law as a natural component. The BLS approved the proposed standards at its March 2006 meeting and received authorization from the Board of Governors Committee on Member Oversight to publish the standards for a 90-day public comment period.

According to information provided by the Franchise Law Committee, California was the first state to adopt a

***Continued on Page 12***



To contribute to the Digest,  
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*The Legal Specialization Digest is a bi-annual newsletter written by and for certified specialists, containing articles of interest to legal specialists. The Digest also contains periodic updates on the certification program, general information from the State Bar and the Board of Legal Specialization, columns from the BLS Chair and BLS members, attorney profiles, and more.*

# Public Access and Private Parts

**John W. Munsill**

**Certified Family Law Specialist**

**Y**our client's mental health is at issue in the litigation. . . . Her finances have to be disclosed in her testimony at trial and/or in declarations filed in support of pendente lite orders. . . . You represent a celebrity, a judge, a sports figure, or anyone else with a private life threatened with media exposure because of pending litigation. . . . What can you do, with or without opposing counsel's cooperation, to shield from public exposure those parts of your client's life he or she would prefer to keep private? If you think it's as simple as stipulating to sealing court records, or closing proceedings, or even hiring a private judge to hold hearings in his office, think again.

The leading case in this area is *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court (Locke)* (1999) 20 Cal.4th 1178. In its 48-page opinion, the California Supreme Court reviewed the "extensive" history of public access to both criminal and civil proceedings. (See *Globe Newspaper Co. v. Superior Court* (1982) 457 U.S. 596 re: criminal cases; as to civil, the *NBC Subsidiary* opinion noted numerous lower court cases upholding a First Amendment right of access to civil proceedings, none of which had been taken up for review by the U.S. Supreme Court. *NBC Subsidiary*, 20 Cal.4th at p. 1209.) The Court ultimately concluded that California's "open-court" statute (CCP § 124) must be construed in both civil and criminal proceedings consistently with the First Amendment right of public access under the federal Constitution. (*Id.* at p. 1212.) "Public access to civil proceedings serves to (i) demonstrate that justice is meted out fairly, thereby promoting public confidence in such governmental proceedings; (ii) provide a means by which

citizens scrutinize and check the use and possible abuse of judicial power; and (iii) enhance the truth-finding function of the proceeding." (*Id.* at p. 1219.) Citing *Estate of Hearst* (1977) 67 Cal.App.3d 777, 783-784, the Court noted that individuals who employ the public power of the state court to accomplish private ends do so knowing the "documents and records filed . . . will be open to public inspection." (20 Cal.4th at 1211, fn. 27.)

Per the *NBC Subsidiary* opinion,

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***What can you do, with or without opposing counsel's cooperation, to shield from public exposure those parts of your client's life he or she would prefer to keep private?***

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closure of proceedings and/or sealing of records is allowed only if two things occur: "First, a trial court must provide notice to the public of the contemplated closure. . . . Second, *before* substantive courtroom proceedings are closed or transcripts are ordered sealed, a trial court must hold a hearing and expressly find that (i) there exists an overriding interest supporting closure and/or sealing; (ii) there is a substantial probability that the interest will be prejudiced absent closure and/or sealing; (iii) the proposed closure and/or sealing is narrowly tailored to serve the overriding interest; and (iv) there is no less restrictive means of achieving the overriding interest." (*Id.* at pp. 1217-1218.) "[S]hifting portions of the proceedings to a bench conference or an in camera proceeding to escape the open-trial right goes beyond the histori-



**John W. Munsill**

cally accepted uses of these proceedings and is unconstitutional." (20 Cal.4th at 1215.) In the *NBC Subsidiary* case, privacy concerns of two well-known entertainment figures, Sondra Locke and Clint Eastwood, were not deemed sufficient to justify closing the proceedings or sealing court records.

The *NBC* case was considered so important that two new state Rules of Court, Rules 243.1 and 243.2, were adopted January 1, 2001, to "codify" the Court's requirements as to sealing court records: "Rule 243.1 requires the express findings enumerated in *NBC Subsidiary* and also directs that they must be incorporated in the order sealing any part of the record. Rule 243.2 sets out the procedures [including a noticed motion] to be followed in sealing or unsealing a record." (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 116 Cal.Rptr.2d 833, 837.) Rule 243.2(a) prohibits the court from permitting a record to be filed under seal "based solely upon the agreement or stipulation of the parties." (*Universal City Studios, Inc. v. Superior Court (Unity Pictures Corp.)* (2003) 110 Cal.App.4th 1273, 1282.) These Rules do not apply to "records that are required to be kept confidential by law" or "discovery motions and records



filed or lodged in connection with discovery motions or proceedings.” (Rule 243.1(a)(2).) However, the Rules do apply to “discovery materials that are used at trial or submitted as a basis for adjudication of matters other than discovery motions or proceedings.” (*Id.*)

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***Privacy interests, as in the case of Mr. Eastwood and Ms. Locke, are often losers in the conflict with the First Amendment right of public access to the courts. Even family law litigants are not spared exposure except in rare circumstances.***

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The Advisory Committee Comment (2004) to Rule 243.1 cites the following examples of records “required to be kept confidential by law”: family conciliation court records and hearings (Fam. Code § 1818), in forma pauperis applications, and search warrant affidavits. (Other family law examples include children’s psychological evaluations, parent’s alcohol and drug tests, and mediation proceedings in custody and visitation proceedings (Fam. Code § 3025.5, 3041.5, and §3177); tax returns in support proceedings (Fam. Code § 3552); artificial insemination records (Fam. Code § 7613); hearings to determine parentage (Fam. Code § 7643); hearings re: termination of parental rights (Fam. Code § 7884); and sealing adoption records (Fam. Code § 9200); cf. *Brian W. v. Superior Court* (1978) 20 Cal.3d 618, upholding juvenile court discretion to allow press attendance at fitness hearings.)

The Advisory Committee observes the *NBC Subsidiary* opinion found the following “overriding interests” justify closing hearings or sealing court records “under appropriate circumstances”: various statutory privi-

leges, trade secrets, and privacy interests “when properly asserted and not waived.” Privacy interests, as in the case of Mr. Eastwood and Ms. Locke, are often losers in the conflict with the First Amendment right of public access to the courts. Even family law litigants are not spared exposure except in rare circumstances. (See Fam. Code § 214; *In re Marriage of Lechowick* (1998) 65 Cal. App.4th 1406, 1412-1414.) *Lechowick* noted Fam. Code § 214 authorizes closing family court hearings and proceedings under some circumstances. Per *Lechowick* § 214 is not generally applicable to the issue of sealing family law court files except when an order is entered under 214 closing some part or parts of the proceeding on one or more particular issues of fact on a showing of “particularized need,” in which case, absent a court order to the contrary, any exhibits and transcripts from the closed portion of the proceeding should likewise be confidential. “The law favors maximum public access to judicial proceedings and court records. . . . Judicial records . . . should not be closed except for compelling countervailing reasons.” Family law court files “should be treated no differently than the court files in any other cases for purposes of considering the appropriateness of granting a motion to seal any of those files.” (*Lechowick*, 65 Cal.App.4th at pp. 1412-1414; accord *Green v. Uccelli* (1989) 207 Cal.App.3d 1112, 1119-1120.)

Dictum in *NBC Subsidiary* suggested that the *Lechowick* family law standards are constitutionally inadequate, failing “to take into account rules of procedure and substance set out in . . . cases construing the First Amendment in a similar context.” (*NBC Subsidiary*, 20 Cal.4th at 1195, fn. 11.) In an opinion issued January 20, 2006 (as modified February 1, 2006), the Second District Court of Appeal made this suggestion law, rebuffing the California Legislature

in its recent attempt to require family law courts, on request, to seal any pleading containing the location of, or identifying information about, the parties’ assets and liabilities (Fam. Code § 2024.6, effective as an urgency statute June 7, 2004). (*Burkle v. Burkle* (2006) 135 Cal.App.4th 1045, petn. for review filed 2/27/06.) *Burkle* held that:

1.The First Amendment right of access in ordinary civil cases applies in divorce proceedings and, therefore, divorce court records and proceedings are presumptively open;

2.A statute mandating sealing presumptively open court records (as does 2024.6) must conform to the four *NBC Subsidiary* requirements; and

3.Section 2024.6 meets the first two of the *NBC Subsidiary* requirements (protecting privacy rights in private financial information under Art. 1, § 1, of the California Constitution and, arguably, avoiding “a substantial probability of prejudice to that interest . . . absent the sealing”). However, it “clearly runs afoul of the third and fourth requirements, because it is neither narrowly tailored to serve the privacy interest being protected nor is it the least restrictive means of protecting those privacy interests.” (*Burkle*, 135 Cal. App.4th at 1052-1053.) *Burkle* suggests narrow tailoring would seal “only the information which arguably presents a risk of identity theft or other misuse, such as credit card numbers, account numbers, social security numbers and the like.” (*Id.* at 1066.) As to less restrictive means, the Court notes redaction of the specific identifying information is a viable alternative to sealing an entire pleading. (*Id.* at 1067. Note: new Senate Bill 1015 was approved by the Assembly Judiciary Committee on April 4, 2006. The Bill’s author, Senator Kevin Murray, D-Culver City, is quoted as saying SB 1015 would fix the prob-

***Continued on Page 13***

# Technical Notes from Bovitz.com: Webcasting, Podcasting, and Such

## J. Scott Bovitz

### *Certified Bankruptcy Law Specialist*

How can you attract more visitors to your law firm web site?

Publish new content on your site every month. This content should include: written updates on legal matters; audio lectures; and short videos on legal topics.

It isn't that hard.

If you don't already have a web site, what are you waiting for? Your existing clients, your prospective clients, your partners, and your mother all want to visit your professional web site. Acquire your own law firm domain name (e.g., "bovitz.com," or "smithlawfirm.com"). Make sure all of your e-mail goes through the web site domain (e.g., "bovitz@bovitz-spitzer.com" but NOT "bob@aol.com").

If you need help to acquire your domain name and start your web site, hire a professional and pay them to get your firm on the web. Search for the terms "law firm web sites" on Google (<http://google.com>). Or, contact my friends at <http://mediataskforce.com>. (Tell them that J. Scott Bovitz sent you...but remember that this is my personal recommendation, and not the official recommendation of the Board of Legal Specialization. The Board regrets that it cannot recommend any particular vendor.)

At a minimum, your basic law firm web site should include: a home page (with disclaimers and easy navigation to other web site pages); long form, current biographies of your attorneys and professionals, with recent photographs; a description of your law firm areas of practice by subject matter and client type; contact information for each professional (with direct telephone numbers and e-mail addresses for all profes-

sionals, and the office mailing and street addresses); directions to the office; directions to the courthouse; maps for the office and courthouse; basic billing information and rates (really!); mandatory disclosures required by statute; and helpful information for your clients and would-be-clients about the law firm's areas of practice. Include descriptive "meta data" to help your web site stand out. I have included most of these items on <http://bovitz-spitzer.com>.

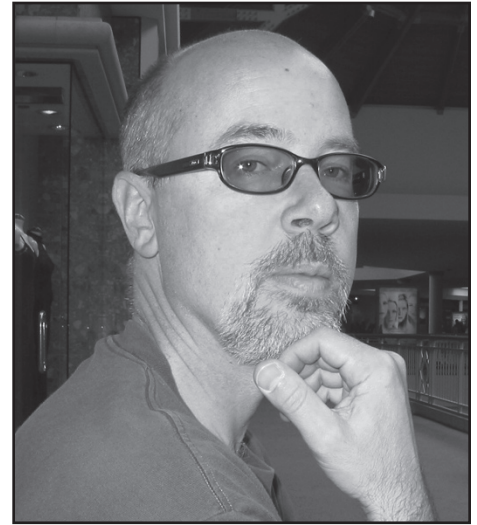
Learn the core software and update the web site EVERY MONTH. I use Dreamweaver software for this job (<http://macromedia.com>). This software is no harder to learn than Word. Your local college or computer store will have an extension class on this popular software.

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***Learn the core software and update the web site EVERY MONTH. I use Dreamweaver software for this job (<http://macromedia.com>).***

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Write and add short articles to your basic web site -- every month, if not every week. Cover the most common questions raised by your clients. Title your articles with the consumer in mind. For example: How do you file an appeal? How will bankruptcy impact on my credit? How can I recover money for my injury at work in California? Can I discharge student loans in bankruptcy? What will happen after I am arrested? These simple articles will increase traffic to your site and your law firm's standing on the search engines. Include a disclaimer that each article is provided



**J. Scott Bovitz**

for general legal advice, and may not apply in every circumstance.

If your law firm is big enough, appoint an editor to review each published article every six months. Bring old articles up to date. But, leave the old articles on the law firm web site (with the edits needed to bring them up-to-date). The longer the articles stay on the site, the more third-party web site links will magically attach to the articles.

The next step is to add short audio programs on the law. Forget live "streaming." Instead, you can produce programs and post them in MP3 format for later listening/downloading. (This is sometimes informally called "Podcasting," since your visitors can download your audio material to their iPods and listen during their commute.) The demand for this type of programming is surprising. A list of MP3 files on your site is fine. (You can find a list of more than 100 of my songs at <http://bovitz.com>. You could put your legal programs in the same type of order, with a list of helpful titles.) MP3 files on your web site can be heard on your visitor's computer, or downloaded for transfer to a

common MP3 player.

All the equipment that you need for audio production is down at your local Guitar Center. If purchased new, you should spend no more than \$750.00 for your "studio equipment." You will need: an inexpensive microphone; an audio/digital converter/recorder (e.g. a low end recording unit from Fostex); a headset; software to edit the audio program. I use Cubase SX (expensive software) to edit my music. For your law firm's audio work, you can get away with Cubase SL, Apple's Garage Band, or one of a number of programs under \$200.00.

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***Perhaps you are one of the many legal specialists who have appeared on a lawyer talk show (such as YOUR LEGAL RIGHTS at KALW in San Francisco with attorney Chuck Finney). If so, you already know that there is an untapped demand for basic legal information.***

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Perhaps you are one of the many legal specialists who have appeared on a lawyer talk show (such as YOUR LEGAL RIGHTS at KALW in San Francisco with attorney Chuck Finney). If so, you already know that there is an untapped demand for basic legal information. Give the information to the public, in your own voice. This will make prospective clients more comfortable with your voice and the legal process. Some clients prefer audio to the written word. Plus, audio (and video) programs give the client a chance to get comfortable with you. The law is scary to most consumers.

You can also produce video programs on legal topics!

CEB (<http://ceb.org>) and other

respected educators already produce audio and video programs for continuing legal education credit. These are usually produced by expensive professionals and sent out in real time; the video and audio is "streamed" to the public. But, live streaming (such as CEB and ALI-ABA use) is very expensive. Also, the success of video recorders and TIVO demonstrate that audiences won't always want to listen to your message when you broadcast. So, you will want to produce (and post) short videos for viewing by your public at a later time.

You can use a simple mini-DV recorder for the video. You will probably still want to use the audio equipment (listed above) for the audio portion of the program. You can mix and edit the video and audio on Adobe Premiere (expensive, but worth it). If you need some help starting out, hire a student filmmaker from your local college. Or, call a one-stop shop such as Lewolt Productions at (818) 260-0520. (Again, this is only my personal recommendation.) You should budget no more than \$2,000.00 for a semi-professional production of up to five minutes. If you script and film ten short videos in one day, the cost per video will be much less.

When each short video is complete, you could post the "film" to your web site in Real Media (unruly and not rec-

ommended), QuickTime (<http://apple.com>), or Flash (<http://macromedia.com>) formats. Your visitors will be able to download the video without special equipment if they have speakers and the free software viewers for these formats. (Macromedia represents that more than 90% of the U.S. computers have software to view Flash videos.)

Keep your films short so that download times are kept to a minimum. Some visitors will be able to view the first part of your program while the rest of the video is still coming over the Internet. Others will need to wait for the complete file to download. To help your visitors determine if they really want the content of a given video, post a synopsis of each video in plain text on your web site.

If you are already using audio or video on your site, drop me a line to [bovitz@bovitz.com](mailto:bovitz@bovitz.com). I may share your comments with our readers in a future column. ■

*Mr. Bovitz is a Certified Specialist, Bankruptcy Law, State Bar of California Board of Legal Specialization. He is also Board Certified in Business Bankruptcy Law, American Board of Certification and the executive editor of the CEB publication, "Personal and Small Business Bankruptcy Practice in California." Bovitz has also written and posted more than 83 original songs on <http://bovitz.com>.*

## 344 Attorneys Pass Legal Specialist Exams

**T**hree hundred forty-four (344) attorneys passed the August 2005 legal specialist exams given in eight areas of law, which represents an overall pass rate of 65%. The next exam is scheduled for August 12, 2007. Online registration will be available at [www.californiaspecialist.org](http://www.californiaspecialist.org) after November 1. ■



# Lex Lingua:Part I

**By James W. Talley**  
**Certified Family Law and**  
**Workers' Compensation**  
**Law Specialist**

**I**t is absolutely amazing how much misunderstanding and confusion the terminology and vocabulary of the law creates even among lawyers. This piece was inspired by a question posed to me by a non-lawyer friend who served on jury duty and was confused as to what the term "*Voir Dire*" meant. In talking with my law partner, Tom, I opined that the term meant "*to ask questions*." Tom, however, thought that the phrase meant in so many words, "*To tell the truth*." Tom was right.

I find that lawyers often use terms that they do not know the precise meaning of, and even when they know the correct meaning of a term, they often don't know how to pronounce it and/or have differences of opinion with our fellow lawyers as to how it is pronounced.

As to "*Voir Dire*," I personally pronounce it "*Vwar Deer*." Other attorneys pronounce it "*Vor Dire*," while some pronounce it "*Var Deer*" and yet others "*Vwar Dire*." Another troubling term is "*Elisor*." For starters, I don't recall the term *Elisor* ever being mentioned in any of my law school studies. In fact, I never even heard the term until some three years into practicing law when a local "*good ol' boy*" family law attorney asked the court to appoint an *Elisor* to sign a document in a case where we were on opposite sides. Not wanting to betray my ignorance of this unfamiliar term, I said nothing. Eventually, I divined that what was being requested was the appointment of somebody in the County Clerk's office to sign a legal document for my client, who was either unavailable, or refused to sign. As the

years went by, I have used the term *Elisor* frequently feeling quite confident that it referred to someone who signed any legal document for another.

A couple of years ago, however, I was surprised to learn that Black's Law Dictionary defines the term *Elisor* as a person appointed or authorized to either (a) execute any writ or (b) take charge of a jury retiring to deliberate. Does that mean that all of the orders that I obtained in the County Clerk's office to sign other documents are invalid?

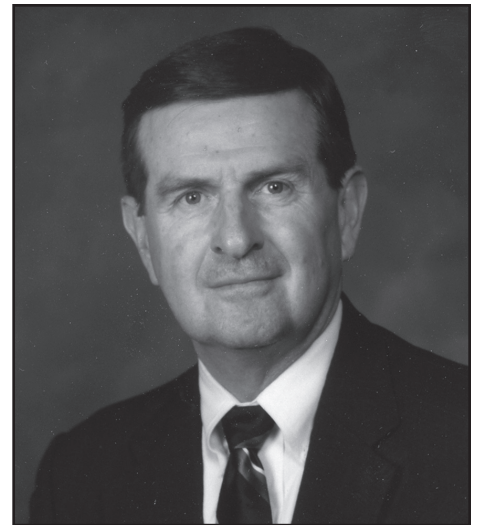
The term "*Subpoena Duces Tecum*" has also been the subject of disparate pronunciations. For starters, is the first word pronounced "*soo-peena*," "*suh-peena*," "*suh-peeny*," or none of the above. As to the second word, is it "*doocus*" or "*doosus*?" And is the last word pronounced "*teecum*, *take-um* or *tek-um*."

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**How about the term "Ex-Parte?"**  
**Spelling this term is no problem. Likewise, pronouncing it is a piece of cake - "ex party," or "ex partay," no big difference. The definition seems to have changed though.**

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How about the term "*Ex-Parte*?" Spelling this term is no problem. Likewise, pronouncing it is a piece of cake - "*ex party*," or "*ex partay*," no big difference. The definition seems to have changed though. *Ex parte*, by definition, means one party, or when applied to the phrase *ex parte* hearing, one party being heard without notice to the other. *Ex parte* hearings in my local courts, however, have evolved from requiring two hours advance notice to the other party, then four hours advance notice, and now twenty-four hours notice to



**James W. Talley**

the other side even when the other side is *In Pro Per*. In short, except in emergency situations, that which is now labeled an *ex parte* hearing is in fact no longer consistent with the true meaning of the term.

Another problematic legal phrase is "*motion in limine*." Though not all lawyers were educated as to the term in law school, most lawyers, at least those who do trial work, became acquainted with motions in *limine* early in their careers and came to know that it meant "*motion at the outset of a trial*." But few lawyers agree on how to pronounce "*limine*." Is it pronounced "*li-mi-nee*, *li-mi-nay*, or is it *li-min*?"

Legal terms and phrases can indeed make the language of the law mysterious and uncertain for laymen as well as lawyers. Clients hear about U.S. Supreme Court cases, which emphasize the importance of separation of church and state. Imagine their confusion when they come to our office and are presented with a complaint we propose to file on their behalf, which concludes with a prayer.

Also consider the identity crises that California dissolution of marriage (divorce) clients have when they are asked to sign different court docu-

**Continued on Page 15**

# California's Dual Certified Specialists

**By Harold J. Cohn**

**Certified Family Law Specialist**

It is said that attorneys are handmaidens in the service of the law, while another adage warns that no slave can serve two masters. The California Bar can boast a number of Certified Specialists who do serve two masters by concurrently holding dual certified specializations.

In California there are eight recognized areas of legal specialization: appellate, criminal, estate planning, trust and probate, bankruptcy, family, immigration and nationality, tax, and workers' compensation. Mathematical permutation would yield a possible 56 different types of dual specialization possibilities. As of March 2006, ten of these possible "mixed bags" of dual specialists are represented by 94 dual specialization practitioners.

Tax/estate planning, trust and probate has 71. Criminal/appellate comes in second with eight. Family/estate planning, trust and probate claims five. Family/appellate has three, Family/bankruptcy has two, and tax/bankruptcy, criminal/family, workers' compensation/family, estate/bankruptcy and tax/immigration each have only one.

Being able to pass the rigorous test to become certified in two distinct areas of the law is only one of the challenges these 94 attorneys have met. They also have to meet the specific CLE requirements unique to their area. Do they have time for home life?

So who are these "jacks of two trades"? I contacted three dual specialists and inquired.

The dual specialization of tax/bankruptcy is the exclusive province of Ralph Aschuer, practicing in Garden Grove Calif. Aschuer says he has found a great amount of overlap between the special-

ization areas of taxation law and bankruptcy law, particularly when involved with a struggling business seeking debt reorganization. A recurring theme in bankruptcy unfortunately arises from the financing of operations through the underpayment or nonpayment of payroll taxes. While innocent enough at first, the cutting of net checks snowballs quickly to an insurmountable tax obligation which can take both an incorporated entity and its principals to financial ruin. Other, though less sophisticated, overlaps occur in the preparation of bankruptcy petitions for schedule C tax filers, which is equally helpful in the non-bankruptcy arena where exemptions from garnishments are claimed. The dual disciplines are also extremely helpful where tax controversies must be resolved during the pendency of the bankruptcy case.

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***A recurring theme in bankruptcy unfortunately arises from the financing of operations through the underpayment or nonpayment of payroll taxes. While innocent enough at first, the cutting of net checks snowballs quickly to an insurmountable tax obligation which can take both an incorporated entity and its principals to financial ruin.***

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As to CLE compliance, Aschler noted: "CLE is difficult and the best recommendation I can give is to "belong, belong, belong." The bankruptcy and tax sections of the Orange County Bar and the Orange County Bankruptcy Forum help with frequent seminars, often at little or no expense. Similar offerings from the LA County Bar and Beverly Hills Bar Association help provide vir-



**Harold J. Cohn**

tually all of the specialty requirements in bankruptcy. All in all, compliance keeps you abreast of new developments and helps you easily comply with the general practitioner requirements.

Ralph Aschuer believes that his clients have benefited dramatically from his dual disciplines. "In many cases where my services were sought for purposes of a bankruptcy filing, I found that my clients were better served either by not filing bankruptcy at all, or by postponing the filing. In other cases, tax clients have benefited through some combination of tax controversy services followed by a subsequent filing."

James W. Talley practices in Escondido and is the only dual specialist in the state in the areas of workers' compensation/family. "It was no accident that my practice was eventually narrowed down to family law and workers' compensation, as my initial boss in 1972 assigned those cases to me because he did not enjoy practicing in those areas of the law." In 1980 Talley became the first certified family law specialist in Northern San Diego County and became a certified specialist in workers' compensation in 1987. Asked whether he feels that workers' compensation and family law are an odd combination, and whether there are drawbacks and/or advantages to his unique specializations, he notes: "Over the years I have



had hundreds of clients with both family law and workers' compensation cases pending. It simplifies the stressed out client's life by having the luxury of being represented by one lawyer—one stop shopping as it were. I have obtained a significant number of cross referrals from practitioners in both areas." As to the CLE time commitment, Talley notes that the Southern California CAAA (California Applicants Attorneys

Association) annual seminar is always presented in late January and the CFLR (California Family Law Reports) annual refresher course is in February. "The time commitment is significant but absolutely necessary and more than a worthy investment."

James M. Hallett practices in Manhattan Beach and is the only criminal and family law dual specialist in the state. Hallett joined the Los Angeles County Public Defender's office in 1973 and spent 9 years there, ending with a stint in the appellate section. He then took the criminal law specialist exam and went into private practice. Hallett notes that, while criminal law specialization has not proven to be much of a marketing tool for him "it has been a great help in providing me instant credibility when clients first come in the door and when prosecutors and judges don't know me."

Hallett branched slowly into family law about 20 years ago. "The connection to criminal law skills is not as remote as you might think. Both require people skills more than book learning. Both involve more barrister work and less



solicitor work. Understanding divorcing families is very similar to understanding the brokenness in families that produces criminal behavior." He took the family law legal specialist exam at age 50. "Walking into the exam room and finding myself surrounded by lawyers age 35 was a bit intimidating since their exam-taking muscles were a lot fresher than mine, but I managed to squeeze by. While family law specialization requires a whole different set of CLE than criminal law, I manage to keep up on both."

Hallett notes that "there are obviously great lawyers who have never sought to be certified by the State Bar as specialists, and indeed word of mouth referrals from reputable sources remains the best way for clients to select lawyers. But specialization is a terrific screener for the many people who have no access to reliable referral sources and virtually every specialist I know is operating at a high level of skill and experience."

So whatever masochistic impulses led these three attorneys to take two specialization exams has served them well. More importantly, specialization has served their clients well. ■

*Harold J. Cohn is a certified family law specialist and member of the Board of Legal Specialization, where he serves on the Digest's editorial board. He was a grader for the first Family Law Specialist Exam and has also graded subsequent exams. He has served on the State Bar Family Law Section Executive Committee, 2000-2003; Family Law Advisory Commission, 1997-2000; chair, LA County Bar Association Family Law Section Executive Committee, 1999-2000; former co-chair, State Bar Standing Committee South on Child Custody and Visitation; Board of Directors, Levitt & Quinn Family Law Center, Inc., a non-profit law firm, 2000-2005; Executive Board Member, Beverly Hills Bar Association, Family Law Section, 1985-2005, and Executive Board Member, LA County Bar Association, Family Law Section, 2003. He is an author and lecturer, and is rated AV by Martindale-Hubbell.*

## Getting Paid After BAPCPA

### Continued from Page 1

(§§ 328 - 331). Section 330(a)(1) provides that after notice and a hearing, the bankruptcy court may award a professional person *reasonable compensation* for actual, necessary services rendered by such a professional and reimbursement for actual, necessary expenses. In determining the amount of reasonable compensation, §330(a)(3) provides that the court shall consider the nature, the extent, and the value of such services taking into account all relevant factors, including -

- (A) the time spent on such services;
- (B) the rates charged for such services;
- (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case. . .;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) *with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field (emph. added);* and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

With the addition of §330(a)(3)(E), Congress and BAPCPA have finally made board certification a specific factor in awarding compensation to bankruptcy professionals. In other words

bankruptcy attorneys who make the time and effort to achieve and maintain certification as specialists by the California State Bar Board of Legal Specialization or the American Board of Certification will now be able to seek and obtain approval for higher hourly rates. In an era where most bankruptcy attorneys will see reduced consumer bankruptcy case filings in the future and, accordingly, reduced income, perhaps obtaining board certification in bankruptcy law is now, more than ever, too costly to pass up. ■

*Mr. Bedoyan is a Certified Specialist, Bankruptcy Law, State Bar of California, Board of Legal Specialization. He is a partner with the Fresno law firm, Caswell, Bell & Hillison LLP and is the current Chairperson of the Bankruptcy Law Advisory Commission to the California State Bar Board of Legal Specialization.*



## Top 10 Counties (by number of attorneys)

Los Angeles	1,041	Sacramento	200
San Diego	437	Alameda	166
Orange	382	Contra Costa	135
San Francisco	275	Fresno	104
Santa Clara	250	Ventura	101

***There are 4,049 Certified Legal Specialists***

## Filing a Petition

*Continued from Page 1*

denied due to failure to follow the procedural requirements for filing a petition, this article sets out some tips for avoiding missteps in the filing process.

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***Even before you receive an adverse ruling, if you are arguing a crucial issue in the case, determine the deadline for filing a petition for writ of mandate should it be required.***

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### I. Time is Of The Essence.

Even *before* you receive an adverse ruling, if you are arguing a crucial issue in the case, determine the deadline for filing a petition for writ of mandate should it be required. The time in which to file depends upon whether the petition is pursuant to a specific statute or is a common law writ. If a statute authorizes the petition, then that statute usually sets both the time in which the petition must be filed, and the event which triggers the running of time. Some deadlines are very short: a party challenging the grant or denial of a motion disqualifying a judge, for example, must file the petition within ten days of notice of the ruling; i.e., if the court rules from the bench, the time has started. (See CCP § 170.3 (d).) Some statutes allow the trial court to extend the deadline (see CCP § 437c subd.(m)(1)) and counsel should usually move for such an extension immediately to ensure a timely filing.

The time for filing a common law writ petition is governed by the doctrine of laches, which is generally interpreted to mean the petition should be filed within 60 days of the date of the ruling. (See, e.g., *Volkswagen of America, Inc. v. Super. Ct.* (Adams) (2001) 94

Cal.App.4th 695, 701.) However, if you are asking the Court of Appeal to take immediate action -- such as granting a stay of the proceedings -- your request is undermined if you wait 60 days to file.

## II. Preparing The Writ Petition

### A. Be Familiar With The Basic Requirements For Writ Review.

CCP § 086 holds that "the writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law" and that the petitioner must have a "beneficial interest" in the lawsuit. In addition, the petition must show that "irreparable injury" will result if relief is not granted. Determine how these terms are interpreted before drafting a petition. (See *Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266 for general requirements.)

### B. Be Familiar With the Relevant Statutes and Rules of Court.

The general statutes governing extraordinary writ petitions are CCP §§ 1067 through 1077 and § 1107 (certiorari), 1084 through 1097 and § 1107 (mandate) and 1102 through 1107 (prohibition). If the petition is authorized by a specific statute, review the statute for requirements. Rule 56 of the California Rules of Court and the local rules governing the Court of Appeal in which you will file are mandatory reading. Failure to follow the *procedures* laid out in court rules could result in an adverse ruling on the petition.

### C. Order an Expedited Reporter's Transcript.

Order an expedited transcript of the hearing which led to the ruling from which writ relief will be sought -- *even if nothing important was said*. If the expedited transcript has not been received by the time you must file your petition, explain in the petition that you have ordered an expedited transcript and

will file it with the court upon receipt. If the hearing was not recorded or there was no hearing, prepare a declaration to that effect pursuant to California Rules of Court, rule 56, subdivisions (c)(1)(D)- 8)(2).

### D. Prepare The Exhibits To The Petition Promptly

A writ petition is supported by the relevant trial documents submitted as exhibits to the petition. Identifying, assembling, organizing and indexing the exhibits will take longer than you think. Because every statement of fact to which you refer in the petition must have a reference to an exhibit, the exhibits must be assembled and paginated early in your preparation. (Note: some courts *may* admit additional facts contained in declarations with supporting documentation. See, e.g., *McCarthy v. Superior Court (Contra Costa County)* (1987) 191 Cal.App.3d 1023, 1030, fn.3; but see *People v. Superior Court (Lavi)* 4 Cal. 4th 1164, 1173, fn.5.) Be sure to include all necessary documents, including supporting and opposing documents, as well as the transcript (as noted above) and a copy of the order from which relief is sought. (See Cal. Rules of Court, rule 56, subds. 8) and (d).)

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***Order an expedited transcript of the hearing which led to the ruling from which writ relief will be sought -- even if nothing important was said.***

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### E. Drafting The Petition.

#### 1. Know the Format.

The formal "petition" portion of a writ petition is similar to a complaint, setting out the facts in separate numbered paragraphs with references to the exhibits. It is often used as the statement of facts. The petition must be verified by a person with knowledge of the facts alleged, which is frequently the



client but may be the counsel.

2. *Know the Proper Prayer*

Following the initial portion of the petition which sets out the factual background and advises the court why immediate relief is necessary, is the prayer. In this formal request for relief, the petitioner may request an alternative writ, a peremptory writ or both. Know the difference (see CCP §1087) and check local rules to determine whether the court in which you are filing requires a specific pleading on this issue. For example, Division One of the Fourth Appellate District requires petitions for writ of mandate and prohibition to pray solely for a peremptory writ, and the court will not accept a petition praying for an alternative writ. (See Fourth App. Dist. Rule 3; see also First District rules.)

3. *Alert the Court Immediately and Clearly About the Problem Presented.*

The Court will want to know the nature of the case, the specific issue or issues raised by the petition, and why writ relief is necessary -- i.e., (1) what irreparable harm will occur if the writ is not granted, and (2) why appeal from the final judgment is inadequate or unavailable. Put this information in the beginning of the brief so the Court is immediately oriented to the problem presented and the need for immediate action. It is important that the petition clearly and as simply as possible set out the problem presented and the relief required to solve the problem.

4. *When an Immediate Stay is Requested, and/or the Trial is Set for the Immediate Future, Say So on the Cover of the Petition.*

When requesting an immediate stay, alert the Court of Appeal by so stating in underlined, capital, bold letters on the front cover of the petition. (Cal. Rules of Court, rule 45.) If a trial date is imminent, the trial date should also be identified immediately under

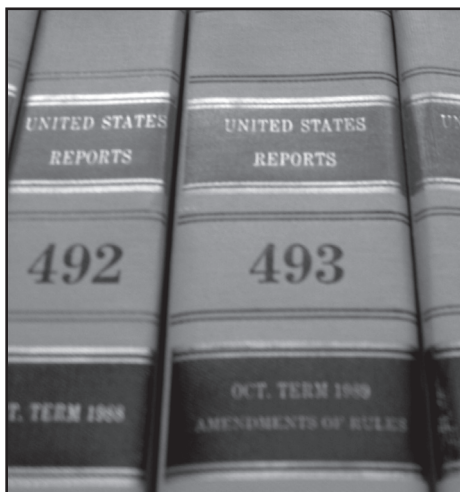
the **STAY REQUESTED** notice on the front cover. (*Id.*)

5. *Know the Rules Governing Service of the Petition in Advance.*

Because personal service on the opposing parties is required by local rules in some districts, you must plan ahead to serve the parties. Personal service should always be used when requesting an immediate stay. (See, e.g. 4th App.Dist.R.1) The petition must be served on the respondent trial court and all real parties in interest named in the petition, identifying the status of each party served and the attorney representing that party and providing counsel's phone numbers. (Cal. Rules of Court rule 56 (f).)

Advance planning, strict adherence to procedural rules and thorough editing to make the petition clear and precise are the keys to filing an effective writ petition. While total conformance with this advice will not guarantee the granting of the petition, it will help insure that the importance of the issues you raise are understood and considered by the Court. ■

*Joan Wolff is a Certified Appellate Specialist and practices in San Francisco. She has served as Chair of the Appellate Law Advisory Commission and the Board of Legal Specialization.*



**New Specialties Under Consideration**

*Continued from Page 2*

law regulating the sale of franchises. The Franchise Investment Law is roughly modeled on securities law. A franchisor must apply to the Department of Corporations and register his or her franchise disclosure documents with the state. Changes to these documents must also be registered with the state. The Federal Trade Commission has also adopted similar federal rules for franchisors.

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***The percentage of California lawyers with substantial franchising experience is small but growing. However, the franchising industry is growing very rapidly.***

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The franchise relationship is also governed by California law. The termination, renewal and other aspects of the legal relationship between franchisors and franchisees is regulated by the California Franchise Relations Act, enacted in 1980. In addition, there are specialized franchise laws which apply to a few specific industries such as petroleum.

Because of the complexity of the franchise relationship and the rules governing franchise sales, there is a need for experienced counsel to provide a variety of legal services both to the franchisors and to franchisees seeking legal counsel and assistance. The experience of the members of the Franchise Law Committee has been that both franchisors and franchisees benefit from extensively experienced counsel in preparing and reviewing franchise documents. In particular, franchisees may be small business owners without a high level of sophistication or ability to find competent legal franchise counsel. The creation of a franchise law specialty

would assist the public by making franchise law specialists easier to locate. The Department of Corporations has also noted that experienced counsel help smooth the process of filing documents as filings prepared by inexperienced counsel can raise significant compliance issues which may require ‘repair’ or lead to litigation.

The percentage of California lawyers with substantial franchising experience is small but growing. However, the franchising industry is growing very rapidly. As a consequence the demand for legal counsel has grown as well. The creation of a Franchise Law speciality would provide franchisees and franchisors with more ability to find experienced legal counsel.

The Franchise Law Committee has been in existence for more than 20 years. There are two major national conferences held each year; the American Bar Association’s (ABA) Franchise Forum and the International Franchise Association’s Legal Symposium, with regular attendance approaching 1,000 attorneys. The 170 members of the ABA’s Franchise Forum who practice law in California are potential specialists. The Franchise Law Committee estimates that approximately 250 California attorneys would seek certification as a Franchise Law Specialist, allowing the specialty to support itself financially. There are currently no other states offering certification in Franchise Law.

### **Real Estate Law**

Proposed Standards for Certification and Recertification in Real Estate Law were circulated for public comment last May. The results were 42% in favor of certification in real estate law and 58% opposed, many of whom expressed the opinion that the field was too broad to be meaningful. In light of the public comment, the Board of Legal Specialization decided to refer the standards back to the Real Estate Law Consulting Group

to examine the feasibility of a consumer-oriented real estate law specialty. For the full text of the proposed standards, go to [www.calbar.ca.gov](http://www.calbar.ca.gov) and look for the Public Comment link on the right-hand navigation bar. ■

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### **Public Access and Private Parts**

#### ***Continued from Page 4***

lems with § 2024.6 “by requiring judges to block out the financial information, rather than sealing entire pleadings.” Hill, *Divorce Privacy Bill Moves Ahead*, The Sacramento Bee (April 5, 2006) pp. A3-A4. ))

Hiring a private judge will not avoid compliance with the *NBC Subsidiary* requirements as to public access to hearings or sealing of court records: California Rules of Court, Rule 244(e), specifies that parties who hire a privately compensated temporary judge are deemed to have elected to proceed outside the courthouse; however, it also requires the court clerk to post a notice of the case name and number and the phone number of the person to contact to arrange for attendance at “any proceeding that would be open to the public if held in a courthouse.” (Rule 244(e).) Rule 244(f) authorizes the presiding judge to determine the hearing or trial site upon request of any person who wants to attend.

Any request to seal records in a case being heard by a privately compensated temporary judge must be made by noticed motion and heard “by the presiding judge or a judge designated by the presiding judge.” (Rule 244(g).) Further, the motion must be “served and filed” and mailed or delivered not only to opposing parties/counsel but also to “any person or organization who has requested that the case be heard at an appropriate hearing site [newspaper, radio, television, tabloid, paparazzi, the

IRS?].” (*Id.*)

Similar rules as to hearings and sealing court records apply to matters before a referee appointed by agreement (versus by order on motion). (See California Rules of Court, Rule 244.1(e), (f), and (g).)

The lesson here is don’t assume preserving your client’s constitutional right of privacy against the First Amendment right of public access is a simple matter. Forget stipulations and private judges. If you are going to have any chance of preserving privacy, either avoid litigation or, if you must access the courts, do your *NBC Subsidiary*/Rule 243.1 and 243.2 homework, follow proper procedures, and prepare your client for the worst anyway. Private parts just aren’t that easy to protect. ■

*Mr. Munsill is an A-V rated Certified Family Law Specialist, California Board of Legal Specialization (CBLIS); a member of the Council of Past Chairs of the CBLIS; and a member of the Association of Certified Family Law Specialists (ACFLS). He is also a past chair of the Family Law Advisory Commission of CBLIS; a former member of the State Bar Family Law Section Executive Committee, on which he served as Editor in Chief of the Family Law News from 1988 through 1991; and a former chair of the Sacramento County Bar Family Law Section. He has lectured for ACFLS, Continuing Education of the Bar (CEB), the State Bar of California Family Law Section, Sacramento County Superior Court, and the Sacramento County Bar Family Law Section.*



## The Board of Legal Specialization Would Like to Congratulate and Welcome the Following Certified Specialists to the Legal Specialization Program

(certification dates: November 1, 2005 through April 1, 2006)

### ***Appellate Law***

Douglas Fee                      South Pasadena

### ***Criminal Law***

Simon M. Aval                      Norwalk  
Frank C. Carson                      Modesto  
David V. Herriford                      Los Angeles  
Richard P. Pointer                      San Jose  
Elana A. Smith                      Fresno  
Mark T. Sullivan                      Modesto  
Stephen R. Sweigart                      Logan

### ***Estate Planning, Trust and Probate Law***

Stephen A. Bond                      San Diego  
Eve T. Contente                      Albany  
Michael T. Ditter                      San Diego  
Dan J. Hall                      Pleasanton  
Josef D. Houska                      Santa Barbara  
Thomas M. Johnson                      Riverside  
Richard J. Kohlbrand                      Westlake Village  
Lawrence M. Lebowsky                      Los Angeles  
Bettie B. Marshall                      Campbell

### ***Family Law***

John R. Denny                      Newport Beach  
Katy M. Gronowski                      Lafayette  
Wendy S. Jones                      Torrance  
Jane S. Preece                      Los Angeles  
Eileen Preville                      Oakland  
Brent D. Seymour                      San Francisco  
Donald L. Starks                      Lake Forest  
Evan T. Sussman                      Beverly Hills  
Constance L. Wyatt                      El Dorado Hills

### ***Immigration and Nationality Law***

Zachary M. Nightingale                      San Francisco  
Louis M. Piscopo                      Anaheim  
Karen Kerry Yianilos                      San Diego

### ***Taxation Law***

Gregory R. Wilson                      San Francisco

### ***Workers' Compensation Law***

Sharon A. Higgs                      Stockton  
Steven M. Leeb                      Anaheim  
Janece E. Montgomery                      Woodland Hills  
Samuel M. Praw                      Woodland Hills  
Tod M. Pritchett                      Sacramento  
Darryl N. Purks                      Culver City  
Sean V. Rivera                      Woodland Hills  
Mark A. Romano                      San Diego  
Terry L. Smith                      Thousand Oaks



## Lex Lingua

### Continued from Page 7

ments in their case (Petition, Response, Income and Expense Declaration, Declaration in Support of Order to Show Cause, and Affidavit for Default Dissolution) only to find that their title designation under the signature line on each of those documents is different, i.e., Petitioner, Respondent, Declarant, Affiant, Party, Claimant and Applicant.

Considering the somewhat confusing and inconsistent set of signals they are given, it is no wonder that clients come to lawyers with some rather mixed up and often humorous misconceptions of legal terms. For instance, I have frequently been asked by clients to prepare a “*quick-deed*.” Similarly, I have had several clients refer to a “*partial*” of real property, instead of “*parcel*.” Clients often tell me that they want a “*disillusionment of marriage*.” I like to tell these people that the “*disillusionment*” comes first and the “*dissolution*” comes later. My favorite client malapropism, however, was the guy who asked me to file a lawsuit for “*Defecation of character*.”

Sometimes my secretaries have misunderstood the legal terms I intend to use, or at least fail to type them in correctly, which I fail to catch before they are sent out to court. As a result, we have had documents filed with captions such as “*Motion to Stroke*,” “*Motion to Squash*” as well as one which referred to a “*Hit and rum driver*.”

Before closing this piece, I feel compelled to address a couple of phrases that try the patience of even the most patient judicial officers. First is this fractured front end phrase uttered by attorneys seeking clarification of a judge’s ruling: “*Your Honor, is it my understanding that - - ?*” And the classic No, No in any courtroom, “*With all due respect your Honor*,” which of course is lawyer speak for “*I have no respect whatsoever for your decision*.” As

Certified Legal Specialist, demonstrate your extraordinary legal intellect and common sense by eschewing the use of these sorry solecisms ever again. ■

*James W. Talley is a partner in the Law Firm of Galyean, Talley and Wood in Escondido. He is a Certified Specialist in both Family Law (1980) and Workers’ Compensation (1987); Mr. Talley is a past president of the Bar Association of Northern San Diego County (1985); Vice President of the San Diego County Bar Association(2002-2005), Board of Directors; Chair of the Advisory Board of the San Diego Lawyer Magazine; Editor in Chief of the State Bar Legal Specialization Digest; and Former member of the Executive Committee of the State Bar Conference of Delegates (1995-1998).*



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# Message from the Chair

**J. Scott Bovitz**

*Certified Bankruptcy Law Specialist*

**Y**ou are one of the 2% of California attorneys who are certified specialists in the fields of appellate law, bankruptcy law, criminal law, estate planning, trust and probate law, family law, immigration and nationality law, taxation law and workers' compensation law. The Board of Legal Specialization would like your support to grow the legal specialization program in California.

**Here's how to help: Identify!**

**Speak on legal panels and programs.** Identify yourself as a certified legal specialist in program biographies. Add a reference to <http://californiaspecialist.org>, so that those who are interested can easily find out more information about our program for California lawyers.

**Write articles.** Identify yourself as a certified legal specialist in the biography and add a reference to <http://californiaspecialist.org>.

**Become a regular resource for local television and newspaper reporters.** Ask them (nicely) to identify you as a certified legal specialist in their articles.

**Identify your specialization on your business cards and stationery.** When I give my business card to non-certified attorneys, many will read the certification information and ask about the program. (I send these folks to <http://californiaspecialist.org> for program details.) When I give my business card to a legal specialist, my certification always breaks the ice.

When you meet people, they may ask you about your occupation. Don't say, "I am a lawyer." Instead, say, "I am a certified legal specialist in bankruptcy law" or "I am a certified legal specialist in taxation." This approach can lead to a much deeper conversation.

**Volunteer** for the advisory law commissions, which serve the Board of Legal Specialization. You will meet a group of specialists from across California, learn new developments and practice tips from like-minded folks, and have fun.

Volunteer to sit on the Board of Legal Specialization itself. We need your help! Thanks for supporting our program. ■

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